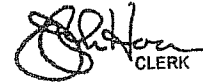


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JUL 09 2013


CLERK

ARMANDO IXTLILCO-HERNANDEZ,)	CIV. 12-5020-JLV
)	
Plaintiff,)	ORDER
)	REJECTING REPORT
vs.)	AND RECOMMENDATION
)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Pending before the court is a report and recommendation submitted by Magistrate Judge John E. Simko. (Docket 16). The report and recommendation addresses the plaintiff's motion to vacate, set aside or correct sentence ("§ 2255 Motion") (Docket 1), plaintiff's supplement to the § 2255 Motion (Docket 11), and the plaintiff's failure to sign and return an Attorney-Client Waiver Form as required by Magistrate Judge Simko's order of December 28, 2012. (Docket 15).

On March 29, 2013, Mr. Ixtlilco-Hernandez filed an objection to the report and recommendation. (Dockets 18). In his objection Mr. Ixtlilco-Hernandez asserts after receipt of the December 28, 2012, order he "did, in fact, sign [a waiver of attorney-client privileges] and have it notarized by the officer who is in charge of the Records Department for FCI Sandstone where [Mr. Ixtlilco-Hernandez] is incarcerated." Id. at p. 1. He asserts this original waiver and a motion (allowing Mr. Ixtlilco-Hernandez the opportunity to ask questions of his former attorney) were then mailed to the Clerk of Court. Id. at p. 2. The original executed waiver and accompanying motion were never received by the Clerk of Court.

Based upon Mr. Ixtlilco-Hernandez's apparent failure to sign and file a waiver of attorney-client privilege as contemplated by the order of December 28, 2012, Magistrate Judge Simko recommended all six claims of ineffective assistance of counsel asserted in Mr. Ixtlilco-Hernandez's supplement to the original § 2255 Motion be stricken. (Docket 16). As a result of that recommendation, the magistrate judge also recommended the § 2255 Motion be dismissed without prejudice.

On March 29, 2013, Mr. Ixtlilco-Hernandez filed another copy of the Attorney-Client Privilege Waiver form dated March 21, 2013. (Docket 17). Mr. Ixtlilco-Hernandez represents the waiver of attorney-client privilege was signed in the presence of another prisoner, Lee Anglin, and the form was then mailed from the prison facility unit. (Docket 18 at p. 2). Mr. Anglin's affidavit supports Mr. Ixtlilco-Hernandez's representations to the court. (Docket 18-1).


Good cause appearing, it is hereby

ORDERED that the report and recommendation (Docket 16) is rejected based on subsequent information received from plaintiff.

IT IS FURTHER ORDERED that the § 2255 Motion and supplement (Dockets 1 & 11) shall remain active and all further proceedings shall be conducted by Magistrate Judge Simko in accordance with 28 U.S.C. § 636(b)(1)(B).

Dated July 9, 2013.

BY THE COURT:


JEFFREY L. VIKEN
CHIEF JUDGE